



## INTERIOR BOARD OF INDIAN APPEALS

Estate of James Wermey Pekah

13 IBIA 264 (09/26/1985)

Judicial review of this case:

Dismissed, *Pekah v. Lujan*, No. CIV-90-1599-W (W.D. Okla. Apr. 23, 1991)

Affirmed, No. 91-6181 (10th Cir. Feb. 19, 1992)

Related Board case:

11 IBIA 237

26 IBIA 200

34 IBIA 188



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ARLINGTON, VA 22203

## ESTATE OF JAMES WERMY PEKAH

IBIA 85-3

Decided September 26, 1985

Appeal from an order on remand issued by Administrative Law Judge Sam E. Taylor in Indian probate Nos. IP OK 30 P 84, IP OK 209 P 83, and IP BI 4B 81.

Affirmed.

1. Indian Probate: Adoptions: Generally--Indians: Law and Order: Civil Jurisdiction

The adoption decree at issue in this Indian probate proceeding is invalid because it was rendered by a state court lacking jurisdiction.

APPEARANCES: George Tah-Bone, Jr., Esq., Mt. View, Oklahoma, for appellant; F. Browning Pipestem, Esq., for appellees. Counsel to the Board: Kathryn A. Lynn.

### OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On October 29, 1984, the Board of Indian Appeals (Board) received a notice of appeal from John Peka (appellant). Appellant sought review of a September 21, 1984, order on remand issued in the estate of James Wermy Peka (decedent) by Administrative Law Judge Sam E. Taylor. On November 19, 1984, the Board received an order from Judge Taylor, denying rehearing of the September order. By notice dated November 21, 1984, appellant was advised that his notice of appeal would be treated as an appeal from the order denying rehearing. Judge Taylor's orders found that the purported adoption of appellant by decedent was void because the Oklahoma court rendering it lacked jurisdiction. The Board affirms that decision.

### Background

This case originally came before the Board by notice of appeal received on September 13, 1982. The persons bringing that appeal, Ralph Wermy, Donald Wermy, Jr., Anna Harry Coffey, Edward Wermy, and Cynthia Wermy, are the present appellees. On July 6, 1983, the Board issued a decision in the original appeal, and remanded the case to Judge Taylor for consideration of whether the Oklahoma court rendering the adoption decree at issue had jurisdiction. Estate of James Wermy Peka, 11 IBIA 237 (1983). The question of the

court's jurisdiction arose because both decedent and appellant were Comanche Indians living on decedent's Indian trust allotment in Oklahoma. The Board found that decedent and appellant were therefore both Indians residing in Indian country under Fisher v. District Court, 424 U.S. 382 (1976), Ahboah v. Housing Authority of the Kiowa Tribe of Indians, 660 P.2d 625 (Okla. 1983), and 18 U.S.C. § 1151 (1982), as interpreted in DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975), McClanahan v. Arizona Tax Commission, 411 U.S. 164, 177-78 n.17 (1973), and Kennerly v. District Court of Montana, 400 U.S. 423, 424-25 n.1 (1971). The case was remanded because of the possibility that Oklahoma state courts lacked jurisdiction over this civil matter between two Indians residing in Indian country.

The background of this case is fully set forth in the Board's earlier decision, and will not be repeated here. In this second appeal, both appellant and appellees have submitted briefs on the question of law raised.

### Discussion and Conclusions

Appellant does not contend that Oklahoma legally had jurisdiction over the adoption at issue here. Instead, appellant argues that the Oklahoma courts had de facto jurisdiction because they had historically exercised jurisdiction and there was no Comanche tribal court.

Civil jurisdiction over Indians in Oklahoma is a legal morass. See, e.g., Muscogee (Creek) Nation v. Acting Muskogee Area Director, 13 IBIA 211, 92 I.D. 309 (1985). Unlike the Muskogee (Creek) Nation, which was one of the Five Tribes, the Comanches never lost their right to exercise civil jurisdiction over their tribal members. Instead, tribal jurisdiction over tribal members was specifically protected in both the Oklahoma Organic Act, Act of May 2, 1890, ch. 182, 26 Stat. 81 (1890), which created the Territory of Oklahoma, and the Oklahoma Enabling Act, Act of June 16, 1906, c. 3335, 34 Stat. 267 (1906), which created the State of Oklahoma. Section 1 of the Organic Act states in pertinent part:

Provided, that nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights which it would have been competent to make or enact if this Act had not been passed.

Section 12 of the Organic Act limits the jurisdiction of the Territorial District Courts, stating in pertinent part: "Provided, that nothing in this act contained shall be so construed as to give jurisdiction to the courts established in said Territory in controversies arising between Indians of the same tribe, while sustaining their tribal relation." This Act clearly protected the jurisdiction of Indian tribes over tribal members.

Similarly, section 1 of the Enabling Act continues the protection of tribal rights; stating:

That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.

Sections 19 and 20 of the Enabling Act declare the courts of original jurisdiction of the new state "to be the successor of all courts of original jurisdiction of said Territories." The state courts are, therefore, subject to the same jurisdictional limitations as the territorial courts, absent later Federal legislation enlarging jurisdiction.

In 1953 Congress passed the Act of August 15, 1953, ch. 505, 67 Stat. 588, P.L. 83-280 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. § 1321 and 28 U.S.C. § 1360 (1982)). This legislation authorized states unilaterally to assume civil and criminal jurisdiction over Indian country within their boundaries. The system established by Public Law 280, as it was popularly known, was subsequently amended with the passage of the Indian Civil Rights Act of 1968, Act of April 11, 1968, P.L. 90-284, 82 Stat. 78, codified at 25 U.S.C. §§ 1321-1326 (1982). Under that Act, state unilateral assumption of jurisdiction was precluded, and assumption of jurisdiction was permitted only after the consent of the tribe involved was obtained. Oklahoma has never acted to assume jurisdiction under either of these statutes. The relationship between these two statutes, and Oklahoma's position in regard to them, were discussed in United States v. Littlechief, No. 76-207-D (W.D. Okla. Nov. 7, 1977), followed and reprinted in State v. Littlechief, 573 P.2d 263, 265 (Okla. 1978):

Under the Act of August 15, 1953, Public Law No. 83-280, 67 Stat. 588 (1953) (hereinafter Public Law 83-280), the Congress gave the States permission to assume criminal and civil jurisdiction over any "Indian country" within their borders without the consent of the tribe affected. Title IV of the Civil Rights Act of 1968, 25 U.S.C. §§ 1321-1326 (hereinafter Title IV), changed the procedure set out in Public Law 83-280 and required the consent of the Indians involved before a State was permitted to assume criminal and civil jurisdiction over "Indian country". See 25 U.S.C. §§ 1321(a) and 1322(a). Like section 6, Public Law 83-280, 25 U.S.C. § 1324 gave States with legal impediments to the assumption of jurisdiction under Title IV permission to amend their constitutions and statutes to remove any such impediments and provided that the assumption of jurisdiction by such a State should not be effective until the required amendments had been

made. Article I, Section 3 of the Oklahoma Constitution constitutes a legal impediment. See H.R.Rep. No. 848, 83d Cong., 1st Sess., reprinted in [1953] U.S. Code Cong. & Admin. News p. 2409. Under the provisions of Public Law 83-280 it appears therefore that the State of Oklahoma could have unilaterally assumed jurisdiction over any "Indian country" within its borders at any time between 1953 and 1968 had the Oklahoma Constitution been amended as required. After the enactment of Title IV in 1968 Oklahoma had to amend its constitution and the affected tribes had to consent to the State's assumption of jurisdiction over them before the State could acquire jurisdiction over "Indian country". See McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 93 S. Ct. 1257, 36 L.Ed.2d 129 (1973); Kennerly v. District Court, 400 U.S. 423, 91 S. Ct. 480, 27 L.Ed.2d 507 (1971). However, the State of Oklahoma apparently has never acted pursuant to Public Law 83-280 or Title IV and assumed jurisdiction over the "Indian country" within its borders. See Confederated Bands and Tribes of the Yakima Indian Nation v. Washington, 550 F.2d 443 (CA 9 1977) at note 3. [Emphasis in original.]

Appellant asserts that Oklahoma did not assume jurisdiction under either of these acts because it was already exercising jurisdiction. Appellant further contends that Federal officials acquiesced to this situation by allowing Oklahoma's exercise of jurisdiction to go unchallenged. Based on these facts, appellant concludes that the Board should recognize Oklahoma's de facto jurisdiction because the Littlechief decision, which was the first to challenge Oklahoma's jurisdiction, was not issued until November 7, 1977, one month after the adoption decree at issue here became final on October 6, 1977. Therefore, appellant contends that his choice of forum was proper, especially in light of the fact that the Comanche Tribe did not have a tribal court at the time.

[1] Initially, appellant's argument asks this Board to validate a state court decree on a theory of "de facto jurisdiction." A court's jurisdiction is established by the constitution or legislation creating it. A court cannot assume jurisdiction that is not conferred upon it. See 20 Am. Jur. 2d Courts §§ 91, 97 (1965); 21 C.J.S. Courts § 28 (1940). The fact that Oklahoma courts may have exercised jurisdiction they did not have, even if that practice continued over a long period of time, did not invest those courts with additional jurisdiction. The Board declines to accept appellant's "de facto jurisdiction" argument.

Appellant's argument concerning the lack of an alternative forum overlooks 25 U.S.C. § 372a (1982), which became law in 1940. That statute reads in pertinent part:

In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption.

(1) Unless such adoption shall have been---

\* \* \* \* \*

(c) by a written adoption approved by the Superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or

(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose \* \* \*.

Adoptions approved by BIA agency superintendents under section 372a(1)(c) were specifically approved by the Board in Estate of Victor Young Bear, 8 IBIA 254, 88 I.D. 410 (1981).

Thus, even in the absence of a Comanche tribal court, decedent had a BIA forum, and possibly a tribal procedure, for considering and approving his attempted adoption of appellant.

Appellant further argues that Comanche Tribal Resolution 83-162 validates any state court adoption issued prior to December 3, 1983, the date the resolution was passed. This resolution recognizes the right of Comanche Indians to exercise their rights as citizens of a state to initiate adoptions under the laws of the state in which they reside. It notes that the tribe is constitutionally bound to give full faith and credit to properly issued state court adoption decrees for all tribal purposes. The Board has already found that the adoption decree at issue was not properly issued under Oklahoma law, because the Oklahoma court lacked Indian adoption jurisdiction. Furthermore, the probate at issue here is not essentially a tribal matter. Thus, the resolution does not validate this adoption decree. 1/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is affirmed.

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//original signed  
Jerry Muskrat  
Administrative Judge

We concur:

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//original signed  
Bernard V. Parrette  
Chief Administrative Judge

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//original signed  
Anne Poindexter Lewis  
Administrative Judge

1/ There is also no indication that Resolution 83-162 was submitted to and approved by BIA, as required by the Comanche tribal constitution.